

Distributing Religious Materials in Public Schools

Distribution of religious materials in schools is an access issue. As such, it presents a variety of questions involving the source of distribution, the method of distribution, the place of distribution, the time of distribution, and the content of distributed information. This issue can be of significant interest to school business officials because of their potential to give rise to litigation that can be costly to their school boards.

The Supreme Court's decisions in *Lamb's Chapel v. Center Moriches Union Free School District* (1993) and *Good News Club v. Milford Central Schools* (2001) indicated that community organizations had a right of access to public school facilities during nonschool hours where other nonreligious groups were permitted to meet. In addition, non-

curriculum-related religious student groups have access to school premises for meetings during noninstructional times under the Equal Access Act unless school officials have restricted use of the facilities to curriculum-related groups (*Prince v. Jacoby* 2002).

Method of Distribution

Two separate cases from Montgomery County, Maryland, reflect the Fourth Circuit's approach to sending religious flyers home with students as part of a school's "take-home flyer forum." In the first cases, *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools* (2004), the Fourth Circuit held that an elementary school had engaged in impermissible viewpoint discrimination when



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it refused to include Good News Club flyers as part of its take-home flyer forum while permitting a number of non-profit organizations to submit their materials to the school for placement in packets that were to be sent home with the students.

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The school board revised its take-home policy and limited nonschool take-home flyers to youth sports clubs. However, the revised policy granted considerable discretion to school administrators to permit inclusion of other organizations' flyers if determined to be in the best interest of the school. This revised policy was invalidated by the Fourth Circuit as conferring undue discretion on school administrators (*Child Evangelism Fellowship of MD v. Montgomery County Public Schools* 2006).

Other federal courts have permitted community groups to distribute materials through take-home flyer forums (*Child Evangelism Fellowship of New Jersey v. Stafford Township School District* 2004; *Rusk v. Clearview Local Schools* 2004) and have permitted students to distribute religious materials in schools (*M.B. v. Liverpool Central School District* 2007; *Westfield High School L.I.F.E. Club v. City of Westfield* 2003) when the distribution was not disruptive under the *Tinker* test (*Tinker v. Des Moines Community Schools* 1969).

Place of Distribution

Courts have distinguished between classrooms and other locations within schools in terms of free speech rights. Generally, classrooms are reserved for curriculum-related information and are not accessible for distribution of materials by either students or community organizations (*Walz v. Egg Harbor Township Board of Education* 2003). As to the distribution of materials in nonclassroom areas, such as hallways or cafeterias, the most recent federal court decisions generally tend to be unconcerned about whether the school has created a limited public forum in the nonclassroom areas and enjoin schools from prohibiting private distribution of religious materials as long as the distribution is not disruptive under *Tinker* (*M.A.L. v. Kinsland* 2007; *Raker v. Frederick County Public Schools* 2007). Although school officials can engage in government speech without including other viewpoints, they will be subject to viewpoint discrimination analysis under free speech as long as

they choose to permit views other than religious ones (*Hansen v. Ann Arbor Public Schools* 2003).

Time of Distribution

Although the Equal Access Act's definition of noninstructional time applies to meetings of non-curriculum-related student groups, that definition seems to work as well for student distribution of religious materials. Noninstructional time for purposes of distribution of materials has been applied to activity periods (*Donovan v. Punxsutawney Area School Board* 2003) and lunchtime (*Ceniceros v. Board of Trustees* 1997). Even if an activity period does not meet the act's definition of noninstructional time, a court can still permit students to distribute religious material during that time under the free speech clause (*Prince v. Jacoby* 2002).

Content of Distributed Materials

No court to date has protected the distribution of proselytizing materials of community organizations. Many public schools have argued that even private student distribution of proselytizing material violates the establishment clause, but the most recent federal decisions treat these materials for what they are—the student's private speech—not school-sponsored speech; thus, they can be distributed as long as they do not violate the *Tinker* disruption test (*M.A.L. v. Kinsland* 2007; *Raker v. Frederick County Public Schools* 2007).

Constructing School District Policies Regarding Distribution of Religious Materials

School boards need to ask several key questions in determining whether community organizations or students can distribute religious materials. The questions for the two groups are similar, but not identical. In the case of community organizations, the Fourth and Sixth Circuits in the Good News Club cases and in *Rusk* suggest responses to the questions.

Community Organizations

- Does the school permit other community organizations to distribute materials? Even if community organizations are permitted to meet after school on school premises, that does not entitle the organizations to distribute materials. However, once the school has permitted distribution of some organizations' materials, free speech prohibits viewpoint discrimination.
- Does distribution take place during noninstructional time, such as the end of the school day? Religious material must be distributed during noninstructional time. Noninstructional time can include homerooms before the beginning of the school day or at the end of the school day.
- When the materials advertise a religious club that meets on school premises after school, do the materials include a parental consent form along with instructions to take the materials home to parents? Sending parental consent forms home regarding flyers for after-school religious

clubs is important to reinforce the message that the materials are being distributed to parents, albeit through their children.

School boards need to ask several key questions in determining whether community organizations or students can distribute religious materials.

- Is the material proselytizing in nature? Distribution of proselytizing material is unlikely to be upheld.

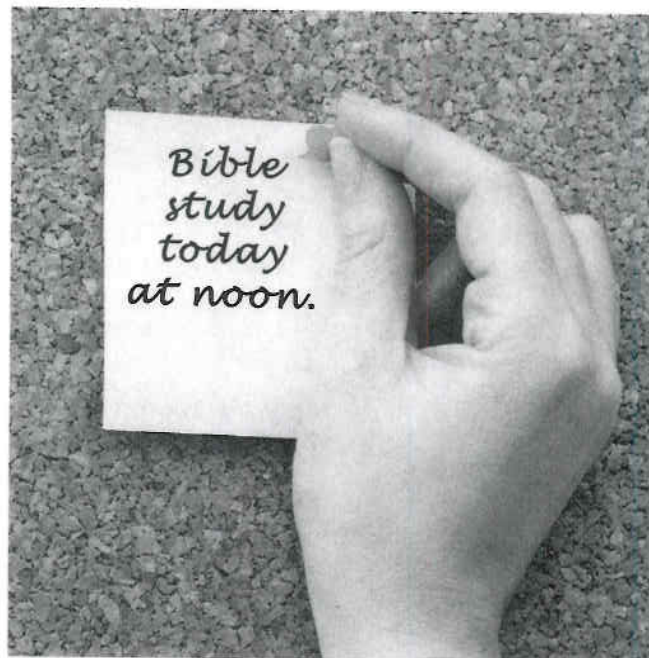
Students

- Does the school permit the distribution of nonreligious materials? Although schools may desire a policy prohibiting student distribution of all non-curriculum-related material during the school day in hallways and at lunch or recess, courts are likely to find that such distribution is protected by free speech under *Tinker* unless the method of distribution or the content of the material is disruptive to the educational process.
- Does the distribution take place during noninstructional time? Noninstructional time includes any part of the school day when instruction does not occur, and includes homerooms at the beginning or end of the school day, as well as recess, lunchtime, and passing periods.
- Is the material proselytizing in nature? Courts have not been especially helpful in defining what constitutes proselytizing material. Generally, nonproselytizing material announces an event (such as a Good News Club meeting after school), whereas proselytizing material seeks to change student behavior (such as an exhortation to accept Christ as personal Savior). Distribution of nonproselytizing material is probably protected under *Tinker* as long as the method of distribution is not disruptive (placing material in students' book bags without their permission or blocking students' progress in hallways until they accept the material).

Conclusion

Case law suggests that the right of any community organizations to distribute material exists only if a school has permitted other such organizations to do so. School officials can choose to deny distribution of all community organization materials; however, they cannot choose to permit distribution of nonreligious materials and exclude all those that are religious.

School officials are more limited in restricting student distribution of materials. Under the Equal Access Act, school



officials can choose to close their forums to the distribution of materials for only curriculum-related student groups. Even so, individual students probably still have free speech rights to distribute religious, even proselytizing, materials during noninstructional time as long as the distribution is not disruptive. ■

References

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